1989

Tracy Candelario v. Gerald Cook : Brief of Appellant

Utah Supreme Court

Mark H. Tanner; attorney for plaintiff.
R. Paul Van Dam; attorney general; attorneys for respondent.

IN THE SUPREME COURT OF UTAH
STATE OF UTAH

TRACY CANDELARIO, Petitioner-Appellant, vs. GERALD COOK, Warden, Utah State Prison, State of Utah, Defendant-Respondent.	APPEAL NO. 890157 14-B

* * * *

BRIEF OF APPELLANT

* * * *

Appeal from the Judgement of the Third Judicial District Court of Salt Lake County, State of Utah, Honorable Judge John A. Rokich, presiding.

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JURISDICTION

The Utah Supreme Court has jurisdiction over this matter pursuant to Utah Code Ann., Utah Rules of Civil Procedure 65B(i)(10). Therefore, jurisdiction is appropriate.

STATEMENT OF THE CASE

NATURE OF THE CASE

This is an appeal from an Order and Judgment of the Third Judicial District Court, in and for Sale lake County, State of Utah the Honorable Judge John Rokich, denying the extraordinary writ of Petitioner/Appellant.

COURSE OF THE PROCEEDING

Petitioner/Appellant filled a Writ of Habeas Corpus, which was denied by the Honorable Judge Scott Daniels, on the 23rd day of July, 1987. Petitioner/Appellant filed a Petition for Relief under Rule 65B(i) of the Utah Rules of Civil Procedure. Said petition was dismissed by Honorable Judge John Rokich on the 22nd day of February, 1989. Petitioner/Appellant filed his Notice of Appeal on the 9th day of March, 1989.

STATEMENT OF FACTS

This action arises out of the sentencing of Petitioner on two different occasions for the same admitted conduct which breached Petitioner's probation requirements. The initial sentencing re-instituted probation for the Petitioner. The

second sentencing revoked probation and committed Petitioner to serve his original prison term.

a. On May 24, 1985 Petitioner was sentenced, after entering a guilty plea to Aggravated Robbery, by Judge Wilkinson, of the Third Judicial District Court, but allowed probation.

b. On December 9, 1985 he was arrested and subsequently charged with robbery.

c. On the 27th day of December, 1985, Petitioner entered a plea of Guilty to an information alleging the commission of a robbery.

d. On February 7, 1986, he was brought before Judge Wilkinson on an Order to Show Cause why his probation should not be revoked. The affidavit in support of the Motion for Order to Show Cause alleged that he committed robbery an, in addition, that he had failed to report to his probation officer, and had failed to make restitution, and had failed to participate in a program to complete community service hours as ordered by the Court.

e. At the February 7, 1986 hearing, the Petitioner admitted to the allegations of the Complaint.

f. At the time of this hearing, Judge Wilkinson knew of the plea of guilty to the robbery charge, but, nevertheless, reinstated the Petitioner's probation.

g. Petitioner was sentenced on the robbery charge on the 14th day of February, 1986 and committed to the Utah State Prison, to serve a sentence not less than one, nor more than 15

years in prison.

h. On the 11th day of April, 1986, petitioner was again Ordered to show cause why his probation should not be revoked. The affidavit in support of the Motion to Show Cause, from which the Order issued, alleged the same commission of the robbery as alleged in the affidavit and Complaint for the February 7, 1986, Order to Show Cause hearing. Petitioner did not receive notice of this second hearing until the morning of the April 11th, 1986 hearing, and had no opportunity to discuss the matter with an attorney, except to be advised that he should admit the allegations again.

i. At the April 11th, 1986 hearing on the Order to Show Cause, Judge Wilkinson revoked Petitioner's probation and committed him to serve a five to life term for the aggravated robbery charge.

j. Honorable Judge Scott Daniels, of the Third Judicial District Court, in and for Salt Lake County, denied Petitioner's Petition for a Writ of Habeas Corpus, stating that the double jeopardy clause of the Utah and United States' constitutions did not apply to the Petitioner.

k. Honorable Judge John Rokich dismissed the Petitioner's Complaint for Relief, indicating that he had no authority to overturn the decision of a judge of equal standing.

SUMMARY OF ARGUMENT

The Appellant in this matter is contending that the Trial Courts incorrectly determined that the double jeopardy clause of

the United States Constitution and the Utah Constitution do not apply to Petitioner in the setting of a probation revocation proceeding. Additionally, Appellant contends that he was denied due process of law because of failing to receive timely notice of the second probation revocation order to show cause.

Appellant argues that the prohibition against placing a person in jeopardy twice for the same offense does apply to a probationer, not withstanding any reduction in other rights that a person who has been found guilty, or has plead guilty to certain criminal conduct might experience. The protection for which the double jeopardy clauses were included in the Constitutions are as necessary for the convicted person as they are for the non-convicted person. To deny petitioner the protection from facing multiple prosecutions for the same alleged violations of probation provisions would be to open the door to continual harassment of the probationer if the probation officials or prosecutors didn't like the actions of the judge. It also allows a judge to be capricious and arbitrary in his or her sentencing procedures of a probationer.

That Petitioner was not served with the Order to Show Cause, and was not informed of the requirement to appear and show cause until the morning of the hearing denied Petitioner the right to due process of law by limiting his ability to prepare for the hearing, and by limiting his ability to adequately defend his position at said hearing.

ARGUMENT I

THE PROTECTION OF THE UNITED STATES CONSTITUTION AND THE CONSTITUTION OF THE STATE OF UTAH HAVE BEEN WRONGFULLY WITHHELD FROM THE PETITIONER

The Constitution of the United States provides that no person shall twice be placed in jeopardy for the same offense. U.S.C.A. Const. Amend. 5. The Constitution of Utah also proscribes placing a person at risk of losing liberty twice for the same offense. Utah Constitution, Article I, Section 12.

The United States Supreme Court has stated that "jeopardy denotes risk...." Breed v. Jones, 421 U.S. 519, 528, 95 S.Ct. 1779, 1785, 44 L.Ed.2d. 346 (1975). The Court further stated that those "risks" include the imposition of "...heavy pressures and burdens--psychological, physical, and financial--on a person charged." 421 U.S. at 529-530, 95 S.Ct. at 1785-1786. Applying the Breed v. Jones decision, the Fifth Circuit Court of Appeals, in U.S. vs. Whitney, 649 F.2d 296 (C.A.Ga. 1981), stated:

> We do not ignore the fact that some of the consideration which prompted the Supreme Court's decision in Breed v. Jones are also present in parole and probation revocation proceedings. For example, parole and probation revocation proceedings may result in further imprisonment. 649 F.2d, at 298.

The Whitney Court further stated, that conduct on the part of the government to bring revocation proceedings against a defendant would "undoubtedly...impose heavy pressures and burdens...on the probationer." 649 F.2d, at 298.

The Fifth Circuit Court of Appeals also held that double jeopardy clause bars a second enhancement proceeding when the evidence at the first enhancement proceedings was insufficient to

establish enhancement requisites. Bullard v. Estelle, 665 F.2d 1347, certiorari granted. 102 S.Ct. 2927, 457 U.S. 1116, 73 L.Ed.2d 1328, vacated 103 S.Ct. 776, on remand 708 F.2d 1020.

The Fifth Circuit Court of Appeals also held that the failure of a district court, in revoking defendant's probation and imposing sentence, to state whether two-year punishment on each of five counts of bank embezzlement ran concurrently or consecutively rendered them presumptively concurrent, so that said district court's subsequent order that they were to run consecutively, entered after defendant had commenced serving sentence, increased defendant's sentence in violation of Fifth Amendment guarantee against double jeopardy. U.S. vs. Naas, 755 F.2d 1133. (C.A.La. 1985).

The Naas Court also held:

> Jeopardy attached when the Defendant was returned to the state facility to commence serving his sentences, and that a subsequent order of the sentencing court that the sentences on each count were to run consecutively placed the Defendant in jeopardy a second time and was an illegal sentence subject to correction. 755 F.2d at 1138.

The Naas Court also indicated that the Fifth Amendment of the U.S. Constitution prohibits resentencing for the same offense. See Naas, supra at 1136.

The petitioner was placed in jeopardy for the offense of aggravated robbery on the 1st day of February, 1985 when he was arraigned on that charge. Petitioner was subsequently placed on probation for the offense on the 24th day of May, 1985. There are no circumstances surrounding these facts which would raise

questions or complaints.

Petitioner was placed in jeopardy for the offense of robbery on the 27th day of December, 1985 when he was arraigned for that offense. He was again placed at risk of "heavy pressures and burdens" when he was ordered to appear and show cause at a probation revocation proceeding on the 7th day of February, 1986. As grounds for this revocation proceeding, the State set forth four alleged violations, including failure to report to his probation officer, a December 9, 1986 robbery (the one to which the Petitioner plead guilty on the 27th day of December, 1986), failure to make restitution payments, and failure to complete community work hours.

While it may be argued that the February 7th hearing was the second phase of a double jeopardy, it appears well settled that the same offense may be alleged once as an original offense and as a probation violation without falling under the prohibition of double jeopardy contained in the U.S. and Utah Constitutions. It is not settled, however, that a second revocation proceeding, on the same facts as a first, does not fall within the constitutional prohibitions.

At the February 7th, 1986 hearing, Petitioner entered a plea of guilty to the charges alleged. With knowledge of the Petitioner's actions, including the December 9, 1985 robbery violation and Petitioner's plea of guilty to same, the Judge reinstated Petitioner's probation.

On the 14th day of February, 1986, Petitioner was sentenced

on the robbery charge, and given a sentence to serve of 1 year to 15 years. On the 11th day of April, Petitioner was again ordered to appear and show cause why his probation should not be revoked. As cause for the second revocation proceeding, the state alleged the December 9th robbery. This was exactly the same allegation of offense for which there had been a first revocation proceeding, and for which his probation was earlier continued. In essence, the State had failed to show that the probation should be revoked at the initial hearing. Pursuant to Bullard vs. Estelle, supra., the State's attempt to try again should have been barred by the double jeopardy clause.

For the third time, Petitioner was placed at risk for the same offense, a December 9, 1985 robbery. Again, Petitioner plead guilty to the charge. While there may have been no problem with the first revocation hearing, the second hearing clearly violated the constitutional protection barring double jeopardy. Clearly Petitioner was at risk of losing his liberty. Even having been committed to serve a 1-15 year term, the imposition of the 5 to life terms for the aggravated robbery meant a longer prison term, both in terms of required service and possible service. According to U.S. v. Naas, supra., the adjustment of Petitioner's sentence after the first revocation hearing, which judgement would result in a greater punishment to the petitioner, by way of a longer prison sentence, was an illegal sentence which should be corrected. Additionally, as is noted on the face of the Judgement and Sentence, signed by Judge Wilkinson, on the

11th day of April, 1986, this proceeding was a resentencing, clearly barred by the U.S. Constitution's fifth amendment.

The Colorado Supreme Court has stated that where original petition to revoke probation was dismissed solely on procedural ground, no double jeopardy issue was involved, indicating that where probation was not dismissed after a hearing on the merits, a subsequent petition to revoke would place the Defendant twice at risk. People vs. Clark, 654 P.2d 847 (Colo. 1982).

A Montana Court has held that prohibitions against double jeopardy do not preclude state from filing a second petition for revocation of suspended sentence alleging same facts as alleged in first decision which was dismissed without any determination on merits, again suggesting that where the probation has not been revoked, after a hearing on the merits, a second attempt by the State to revoke based on the same allegations of violation would constitute double jeopardy. State vs. Oppelt, 601 P.2d 394, 184 Mont. 48 (Mont. 1979).

The United States Supreme Court has noted that emphasis should be placed upon the "punishment" when considering the scope of the double jeopardy clause. The Court stated in U.S. vs. DiFrancesco, "It is the punishment that would legally follow the second conviction which is the real danger guarded against by the Constitution." ___ U.S., at ___, 101 S.Ct. at 433, quoting Ex parte Lange, 18 Wall 163, 173, 21 L.Ed. 872 (1874). The plea of guilty, twice, to the same alleged offenses, is tantamount to a conviction. Once convicted, the Petitioner should not have been

placed at risk a second time because the State didn't like the outcome of the first conviction.

Petitioner was placed at risk by the imposition of "heavy burdens--psychological, physical, and financial," particularly in view of the fact that just two months before, his probation had not been revoked. Clearly, notwithstanding the legal names and procedures, the Petitioner was placed at risk of losing his liberty, and did in fact lose his liberty, for the same offense.

Alternatively, the action of the Court, to revoke sentence during a second revocation proceeding for the same allegation as a first proceeding, could easily be construed or deemed as an enhancement of sentence. Indeed, the heading on the court documents stated that the proceeding was a "Re-sentencing Hearing," not only a revocation proceeding.

The action of the Court, in amending or changing its previous granting of probation amounted to a increase in sentence, clearly barred the Court of Appeals in Naas, supra. As the Naas Court stated:

> The Fifth Amendment prohibition against resentencing for the same offense, however, bars an increase in a legal sentence once it has been imposed and the defendant has commenced serving it. This holds true even if the Court alters the sentence solely to conform to it original intent.

The District Court did in fact lengthen the incarceration of the Petitioner by revoking his probation. Had revocation taken place during the February 7, 1986, hearing, Petitioner would possibly have no argument. During the 2nd hearing, the April hearing, however, the revocation of probation meant that rather than

serving the normally served portion of a 1-15 sentence, the Petitioner would at least have to serve the normally served portion of a 5 to life.

The second revocation proceeding could also be deemed an enhancement of both the original sentence (on the aggravated robbery) and the sentence imposed for the robbery offense. For whatever reasons, the District Court did not revoke Petitioner's probation during the first revocation proceeding. By revoking his probation during the second proceeding the time to be served by the Petitioner, was enlarged, thus enhanced. The Court in Bullard vs. Estelle, supra, stated plainly that a second enhancement proceeding is barred by the double jeopardy clause.

While it may be argued that Petitioner was not placed in jeopardy or at risk, and that the sentence was not enhanced or enlarged, the real outcome does not support such an argument. Had Petitioner not been subjected to the second revocation hearing, he would be serving a 1-15 sentence. After serving the required time for said sentence, he would be released, to complete the remaining time of his probation. In actuality, he must serve additional time for the 5 to life sentence. His prison confinement has in fact been enhanced and enlarged because of the second revocation proceeding.

II.

THE PETITIONER WAS DENIED THE DUE PROCESS OF LAW BY THE FAILURE TO RECEIVE PROPER AND TIMELY NOTICE OF THE APRIL 11, 1986, HEARING ON THE ORDER TO SHOW CAUSE.

The United States Fifth Circuit Court of Appeals has stated

that Probationers are entitled to due process guarantees of the Fourteenth Amendment, and probation hearings must comport with principals of fundamental fairness. United States vs. Brown, 656 F.2d 1204 (C.A. TX 1981). Gagnon v. Scappelli, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973). See also Morrissey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1979).

An Order to Appear and Show Cause was issued by the Third Judicial District Court for both hearings on the Motions for Orders to Show Cause, resulting in hearings on the 7th day of February, 1986 and the 11th day of April, 1986. Rules of procedure require that the Order be served upon the Defendant. The Return of Service filed by the State indicating service states that the Order was served on the 20th day of March, 1986. The defendant has filed his affidavit in the Court below stating that he never received a copy of said Order to Show Cause.

Petitioner was first made aware of the second revocation proceeding when he was taken into court, and told by an attorney, that he should merely plead guilty to the charges, and that there would be no change to the time he must serve, nor would there be any other alteration in his sentence. In fact, the Judge revoked Petitioner's probation and instituted the 5 to life sentence, substantially altering the time to be served and Petitioner's sentence.

Had Petitioner been aware, as of the 6th day of April, 1986, five days prior to the scheduled hearing, that a second hearing was to take place, there is much preparation which might have

been made, thus perhaps altering the outcome of said hearing. In any event, the non-service worked a prejudice to the Petitioner. Because the service of the Order to Show Cause for the second hearing on the probation revocation allegations was not timely the hearing should not have taken place, and any orders made by the District Court at that time should be rendered null and void.

III.

CONCLUSION

There is a noticeable dearth of direction from either the Utah Supreme Court or Federal appellate courts for Utah on the issue of revocation proceedings the their relationship to the double jeopardy clauses of the U.S. and Utah Constitutions. Nevertheless, other courts have indicated that the punishment and fairness must be controlling while handling this issue. Petitioner argues that fairness and justice are best served by striking the second revocation procedure and reinstating his probation as it relates to his initial offense.

DATED this 10th day of July, 1989.

Mark H. Tanner

10/07/88 MHT2736A

ADDENDUM "A" ORDER DENYING WRIT OF HABEAS CORPUS

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

TRACY ALLEN CANDELARIO,	:	ORDER DENYING WRIT OF HABEAS CORPUS
Petitioner,	:	CIVIL NO. C-86-6627
vs.	:	
KENNETH SHULSEN, Warden of the Utah State Prison, State of Utah, Department of Corrections,	:	
Respondent.	:	

As I understand the facts of this case, the petitioner Tracy Allen Candelario was convicted of or pled guilty to Aggravated Robbery. On May 24, 1985 he was sentenced by Judge Wilkinson, but allowed probation.

On December 9, 1985, he was arrested and subsequently charged with robbery. On February 7, 1986, he was brought before Judge Wilkinson on an Order to Show Cause why his probation should not be revoked. The affidavit in support of the Motion for Order to Show Cause alleged that he committed robbery and, in addition, that he had failed to report to his probation officer, had failed to make restitution, and had failed to participate in a program to complete community service hours as ordered by the Court. The petitioner admitted to the allegations of the Complaint. At that time he had already pled guilty to the robbery charge, but had not been sentenced as yet.

A week later, on February 14, 1986, the petitioner appeared before Judge Sawaya for sentencing on the robbery charge. Judge Sawaya sentenced him to 1 to 15 years in the Utah State Prison.

On April 11, 1986, petitioner was again brought before Judge Wilkinson on an Order to Show Cause why his probation should not be revoked. This time the affidavit alleged only the robbery charge. At this second hearing, Judge Wilkinson determined to revoke the petitioner's probation and commit him to prison on the original aggravated robbery charge. He also indicated that the 5 to life term on the first charge would be served concurrently with the 1 to 15 sentence on the second robbery charge.

Candelario brought this Petition for Writ of Habeas Corpus, claiming that the procedure followed violated the double jeopardy clause of the United States Constitution. If I understand the facts correctly, it appears that he was clearly brought before Judge Wilkinson twice on exactly the same allegation, and that his probation was first continued, and later revoked. The only issue, therefore, is whether the double jeopardy clause of the United States Constitution is applicable to a probation hearing. It appears that this is an issue which has not been decided by the Utah Supreme Court.

I am of the view that the double jeopardy clause does not apply. The United States Supreme Court has held that the rights of a defendant in a probation revocation hearing are less than

those in the original criminal action. Gagnon v. Scarpelli, 411 U.S. 788 (1973). This is because the defendant has pled guilty or has been proven guilty, and is not entitled to the same presumptions as a defendant in a criminal action. For this reason, it is often said that a probation hearing is civil in nature, rather than criminal. Regardless of how it is characterized, however, it appears to me that there is much more flexibility in a probation hearing than in an original criminal trial. Once the defendant has been found guilty or has pled guilty, he has no vested right to even be considered for probation. Probation is a contract which he enters into in order to avoid the sentence which could justly be imposed according to law. The Judge has the right to impose any condition upon probation, and the defendant has the right to reject any condition so imposed, and take the prison sentence instead. If he does accept probation along with its conditions, he must also realize that his rights under the probation agreement are not protected by the Constitution in the same way that the rights of a criminal defendant are protected.

I believe the logic of Davenport v. State, (Ct. of Crim.App.Tex. 1978), is applicable and persuasive in this case.

Consequently, the State's Motion to Dismiss is granted. The Petition for Writ of Habeas Corpus is denied.

Dated this 28 day of July, 1987.

/s/ Scott Daniels

SCOTT DANIELS
DISTRICT COURT JUDGE

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Order Denying Writ of Habeas Corpus, postage prepaid, to the following, this_____day of July, 1987:

Tracy Allen Candelario
Utah State Prison
P.O. Box 250
Draper, Utah 84020

Philip G. Jones
Attorney for Petitioner
930 S. State Street, Suite 10
Orem, Utah 84058

Stuart W. Hinckley
Assistant Attorney General
Attorney for Respondent
236 State Capitol
Salt Lake City, Utah 84114

_____

ADDENDUM "B" ORDER DISMISSING EXTRA-ORDINARY WRIT

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IN THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

TRACY CANDELARIO,	:	
Plaintiff,	:	ORDER
vs.-	:	
GERALD COOK, Warden, Utah State Prison, State of Utah,	:	Civil No. 880907135
Defendants.	:	Judge John Rokich

This matter came on for hearing on plaintiff's Petition for Writ of Habeas Corpus and defendant's Motion to Dismiss before the Court on January 30, 1989, at 3:00 p.m. The Petitioner was present and was represented by his counsel, Mark H. Tanner. Respondent was represented by Paul M. Tinker, Assistant Attorney General.

The Court, having reviewed the pleadings and other documents in the file, and having read the memoranda of counsel, and having heard the oral representations of counsel, and being fully advised in the premises, now hereby

ORDERS that this action is dismissed with prejudice as being barred by the doctrine of res judicata and for failure to state a claim upon which relief may be granted.

Dated this _____ day of February, 1988.

BY THE COURT

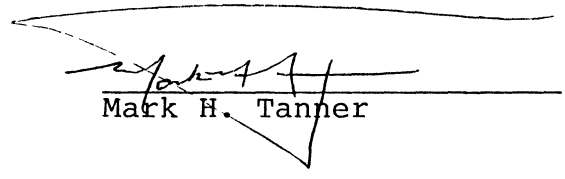
JOHN A. ROKICH, JUDGE
Third District Court

CERTIFICATE OF MAILING

I hereby certify that I caused to be mailed a true and exact copy of the foregoing proposed Order to Mark H. Tanner, attorney for the plaintiff, P.O. Box 1148, Castle Dale, Utah 84513 on this the 14 day of February, 1989.

CERTIFICATE OF MAILING

I, Mark H. Tanner, do hereby certify that on the 12th day of July, 1989, I sent to Paul VanDam, Utah Attorney General, Room 236, State Capitol Building, Salt Lake City, Utah 84114, four copies of the Appellant's Brief, by depositing same in the U.S. Mail, postage fully prepaid.



Mark H. Tanner